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In the Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI RIVER
TRANSMISSION CORPORATION,

Appellant,

VS.

GEORGE B. SIMONTON, SHERIFF AND EX-OFFICIO
TAX COLLECTOR, LINCOLN PARISH, LOUISIANA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL,
SECOND CIRCUIT, STATE OF LOUISIANA

MOTION TO DISMISS

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STATEMENT OF THE CASE

This is a direct appeal from the decision of the Second Circuit Court of Appeal of the State of Louisiana, which was affirmed with the denial of a writ of certiorari by the Louisiana Supreme Court. The Court will note that the Appellee is designated as George B. Simonton, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, but in fact former Sheriff Simonton has subsequently been succeeded by the present officeholder, Sheriff W. Wayne Houck.

As has been stated in Appellant's attempted appeal,

during the 'sixties the demand for natural gas by Appellant's customers continued to grow and increased to the point where the needs of such consumers could not be seasonally met solely from the quantities of natural gas which could be furnished in Appellant's original pipeline system. Although there were several alternative solutions to this dilemma, it was decided that the most economical and efficient method of solving the problem of too much gas in the summer and too little gas in the winter was by developing and placing into operation the underground gas storage fields in Lincoln Parish. These storage fields or reservoirs, which occur naturally and are not man-made, were once developed to produce natural gas; but after depletion, natural gas production from these fields was no longer economically feasible. But they are still capable of holding or storing natural gas injected underground. These reservoirs are referred to as the West Unionville and the East Unionville Storage Fields.

By virtue of the fact that the stored gas of Appellant, Mississippi River Transmission Corporation, remained in the storage fields for a period of several months, in 1977 this gas was assessed for ad valorem taxation by the Louisiana Tax Commission and placed on the tax rolls of Lincoln Parish, State of Louisiana, in accordance with *Louisiana Revised Statutes* 47:1702-2332. Utilizing a statute which provides that payment may be made under protest, a suit was then filed by Appellant denying the liability of the taxation, and seeking a refund of the amount paid plus a 2% penalty as provided in *La.R.S.* 47:2110. Appellant has continued to refuse to pay ad valorem taxes assessed against it for each year thereafter. In lieu thereof, Appellant has chosen to pursue the route of depositing the taxes under protest and seeking to have a judgment requiring their refund along with two per cent interest thereon.

In turn, Appellee has filed answers in the Third Judicial District Court of Louisiana for Lincoln Parish, and this case was tried with a verdict being rendered in the Trial Court in favor of the Appellee. (See opinion of District Court in Appellant's Appendix, pages A-17 through A-28.) Appellant appealed to the Second Circuit Court of Appeal in the State of Louisiana with that Court affirming the decision of the Trial Court in its entirety and holding that the cushion gas and the working gas were subject to ad valorem taxation in Lincoln Parish, Louisiana.[1] *Miss. River Trans. Corp. vs. Simonton*, 442 So.2d 764 (La. App., 2nd Cir., 1983). A writ of certiorari was sought by the Appellant to the Louisiana Supreme Court but that Court affirmed the decision of the Court of Appeal by refusing to issue a writ of review on February 3, 1984.

The contention of the Appellant is that the working gas is not subject to state and parish ad valorem taxation for the reason that it was in transit in interstate commerce and therefore exempt from state or parish taxation. On the other hand, the contention of the Appellee is that this natural gas has a taxable local nexus to Lincoln Parish, Louisiana, during the period that it is being stored in the underground storage fields in Lincoln Parish, and thus is not "in transit" in interstate commerce. The reason that it has this nexus in the State of Louisiana is that the working gas is being stored in Lincoln Parish, Louisiana, for the economic benefit and convenience of Mississippi River

[1] In the original petition of the Appellant it was pointed out that the gas fields contained three catagories of natural gas, i.e. "native gas", "cushion gas" and "working gas". In the lower courts the Appellant conceded that the native gas was subject to the state and parish taxation and no issue was made as to this. In its attempted appeal to this Court, it has now conceded that the cushion gas is subject to ad valorem taxation by the state and parish and that this is no longer an issue. Therefore, there remains only the issue as to the ad valorem taxation of the working gas.

Transmission Corporation and is not a "break in interstate transit, merely incident to the interstate journey."

For the reasons hereinafter set forth, Appellee submits that this Honorable Court is without jurisdiction of an appeal in the case at bar and same should be dismissed at Appellant's cost.

GROUNDS FOR MOTION TO DISMISS

Significantly, the Court will observe that at no time did Appellant in the State Court proceedings argue that *La.R.S.* 47:1702-2332 were unconstitutional. Instead it urged unconstitutionality only as to the application of these statutes to the stored gas at issue here. The object of this motion is to obtain the dismissal of the attempted appeal. The specific grounds for this motion to dismiss are as follows:

1. This Court has no jurisdiction *on appeal* over these proceedings for the reason that the validity of a statute of a state on the ground of its being repugnant to the constitution, treaties or laws of the United States is *not* at issue. (Emphasis added.) 28 U.S.C. 1257(2); Supreme Court Rule 16.1(a).

2. Alternatively, the appeal, which is from a state court, seeks to have a state statute and/or statutes reviewed as to constitutionality even though that issue was not timely or properly raised in the state courts; thus Appellant has failed to exhaust all of its remedies. *Memphis National Gas Co. v. Beeler,* 315 U.S. 649, 62 S.Ct. 857 (1942).

3. Further, alternatively, the appeal should be

dismissed on the manifest ground that the matters raised by the attempted appeal have been decided by judgment resting on an adequate non-federal basis. Supreme Court Rule 16.1(b).

4. Finally, alternatively, upon Appellant's conceding that the so-called "cushion gas" is subject to ad valorem taxes under the Louisiana statutes, the right to appeal on the ad valorem taxation of working gas became moot. Vol. 15, *Corpus Juris Secundum,* pgs. 761-762.

LEGAL ARGUMENTS IN SUPPORT OF MOTION TO DISMISS

The Court will observe from the Appellant's original petition filed in the Trial Court and the Reasons for Judgment by the Louisiana Second Circuit Court of Appeal that the tax which is questioned is an ad valorem tax assessed under the provisions of *Louisiana Revised Statutes* 47:1702 through 2332, providing for the levy and collection of ad valorem taxes on property located in Louisiana. This includes all properties in the State of Louisiana except those upon which taxes are either collected under other provisions of the Louisiana law or are exempt. The Court will observe that there has been no contention heretofore that these statutes are unconstitutional *per se;* and, as a matter of fact, the Court will further observe that Appellant in its appeal conceded tha the tax on certain gas, which had been previously challenged, was collectible under the statute which is now being challenged.

A case that would appear to be in point on this issue is *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649, 62 S.Ct. 857 (1942), which, incidentally, has several similarities to this case. This Court, in denying jurisdiction of the appeal, states at P. 860 of the *Reporter*:

> "The first opinion rendered by the Supreme Court of Tennessee makes no mention of any federal question, and in a supplemental opinion, the Court stated only that 'the claim of federal protective right was decided adversly to complainant.' Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the State Supreme Court to be in issue, we must dismiss the appeal for want of jurisdiction."

Considering the second ground, it is rather elementary that only constitutional questions raised in the lower courts can be brought before the United States Supreme Court on appeal. *Shelly vs. Kramer,* 68 S.Ct. 836, 334 U.S. 1 (1948). A review of the pleadings contained in the Appendices of Appellant's brief will reveal that in no instance has the constitutionality of a state statute been questioned in a lower court. The ground for attack used by Appellant is that the facts surrounding the issue of constitutionality exempt the property sought to be taxed.

As to the third ground, it will be observed that this question has now been raised in two cases similar, if not identical, to the case at bar. These are *Enterprise Products Co. v. Whitman,* 364 So.2d 634 (La. App., 2nd Cir., 1978), *writ denied*, 366 So.2d 916 (La. S.Ct., 1979), and *United Gas Pipe Line Co. v. Whitman,* 390 So.2d 913 (La. App., 2nd Cir., 1980), *writ denied*, 396 So.2d 929 (La. S.Ct. 1981). Decisions by this Court which ruled similarly are *Independent Warehouses v. Scheele,* 331 U.S. 70 (1947), 67 S.Ct. 1062, and a recent decision from this court in which this specific question was discussed; that is *Maryland v. Louisiana,* 451 U.S. 752 (1981), 101 S.Ct. 2114. A footnote in *Maryland v. Louisiana, supra,* appearing on page 755 of the U.S. Supreme Court Reports states:

> "The United States suggests that the uses enunciated in the Act do not have a sufficient local nexus to support the Tax under the Commerce Clause. See *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954). While the local nexus of certain of the uses is suspect, other uses would appear to have a substantial local nexus so that on the present record it would be difficult to say that the entire Tax was unconstitutional on this ground. The Act contains a severability clause providing that if any use is found to be an unconstitutional basis for taxation, the next use would be taxed. See La.Rev.Stat.Ann. §47:1303 F (West Supp. 1981). Given our resolution on the discrimination charge, we find it unnecessary to reach the local nexus claim especially in light of the severability clause. To this extent, the exception of the United States and the FERC is overruled."

On the fourth contention, it has previously been pointed out that Appellant resisted in the lower courts the payment of ad valorem taxes on "cushion gas" under the same statutes from which it now seeks to appeal the levy of taxes on the "working gas." In this appeal, however, it abandons this contention. See page 4 of appellant's Jurisdictional Statement. Appellee contends that, in so doing, Appellant accepts the constitutionality of these statutes and reduces the question as to the applicability of the statutes to the "working gas." In effect, Appellant has conceded the constitutionality of the statutes from which it now seeks to appeal. Appellant has thus rendered any issue as to the constitutionality of the state statute moot and entitled the appellee to have the appeal dismissed, *Corpus Juris Secundum,* Vol. 5, Pgs. 404-415.

The final ground for urging the dismissal of this appeal is contained in Rule 16 of the Supreme Court Rules

which states in Subsection 1(b) that "...the Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and not expressly passed on; or that the Judgment rests on an adequate non-federal basis". It is Appellee's contention that this appeal does not present a substantial federal question. As has been pointed out in portions of the Appellant's appeal and portions of this Motion to Dismiss, the sole remaining question is whether or not the statutes providing for ad valorem taxation in the State of Louisiana provide for the levy on the working gas stored in the underground gas storage fields used by Appellant. It is, of course, the contention of the Appellant that this working gas is exempt from taxation by the state for the reason that it is in the course of interstate commerce and thus protected from state taxation by the commerce clause of the United States Constitution. Contrarily it is Appellee's contention that the facts in this case are clear that there is no real federal question involved. Vol. 15, *Corpus Juris Secundum,* at pages 761-762 gives a concise but clear discussion of the distinction of property immune from local taxation where there is a break in transit and that which is not immune where a break in transit occurs. The following statement is made:

> "The property remains immune from local taxation if the break in interstate transit is merely incident to the interstate journey, such as a breakdown in the transportation system, or a delay to promote the safe and convenient transit of the property, or to await ships or to permit accumulation of sufficient cargo to load a ship. The determination of the question is not controlled by the nature of the billing or by mere changes in the method of transportation, or by the lack of

knowledge of the ultimate destination at the time of shipment, or by the fact that the goods at the point of interruption may be under the control of the owner with power to withdraw or divert the goods.

"*On the other hand, if the transit is interrupted for purposes connected with the business convenience or profit of the taxpayer, the property is subject to local taxation.* Goods may be halted for the beneficial purposes of the owner, who did not from the beginning expect them to have an uninterrupted movement to their final destination, but arranged for their halting until further movement could be made to suit his convenience. After reaching their destination, goods become subject to local taxation although intended for subsequent sale or shipment in interstate commerce.

"The mere fact that a commodity has gone into storage does not necessarily take it out of interstate commerce for the purpose of local taxation. However, if property is stored for an indefinite time during transit, at least for other than natural causes or lack of facilities for immediate transportation, it is subject to local taxation." (Underscoring ours)

The line between the type of interruption that exempts and that which does not exempt is often rather difficult to apply. Numerous cases can be cited by both parties which establish this line under different factual situations, but, we will not burden the Court by a lengthy discussion of these. *General Oil Co. v. Crane,* 209 U.S. 211, 28 S.Ct. 475 (1908); *Brown v. Houston,* 114 U.S. 622, 5 S.Ct. 1091 (1885) and *Gulf Refining Co. of Louisiana v. Phillips,* 11 F.2d 967 (5th Cir., 1926).

In stating that the line of demarcation is difficult to apply, we do not intend to imply that the issue here is not well settled. To the contrary, where the interruption is for purposes connected with the business convenience or profit of the taxpayer, the property is clearly subject to local taxation. *Corpus Juris Secundum, supra.*

It would appear that the testimony of Mr. William Aide, Appellant's executive officer and witness, removed any doubt as to which rule applied here. Although reluctantly, Mr. Aide on several occasions in effect conceded the obvious, i.e. that it was for the economic advantage and convenience of Mississippi River Transmission Corporation that this gas be stored in the two underground gas storage fields in Lincoln Parish, Louisiana. Perhaps, the best example of his reluctant but necessary concession is found on pages 48 and 49 of his deposition, which reads as follows:

"Mr. Adkins:

Q. Mr. Aide, with reference to these storage fields, the question was asked somewhat differently earlier, but to ask the question another way, if these two storage fields in Lincoln Parish were closed, would that cause economic detriment to Mississippi River Transmission Corporation? For any reason if they were closed?

A. They were just closed?

Q. Right. Yes or no?

A. It would cause—if it were closed today, if you walked out and closed off—during the middle of winter, if you walked out and closed off those fields, it would cause a burden upon us. I would

say this, that I—so far as I'm concerned, I would immediately go out and try to get gas from other people to serve our customers.

Q. Well, I understand that. But if it were just closed, period, would that work to your economic detriment?

A. It would certainly reduce our sales and that would work to our detriment. Definitely. Very definitely."

CONCLUSION

In supporting our reasons for the maintenance of this Motion to Dismiss, we have dwelt somewhat at length on the question of the merits. This is not to be construed as a lack of confidence in our Motion to Dismiss. It simply was necessary in order to fully explain the basis of our reasons for contending that this is not a proper appeal. We respectfully submit that this appeal should be dismissed for any one of the reasons that we have outlined heretofore.

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CERTIFICATE OF SERVICE

I, T. J. Adkins, Esq., one of the Attorneys for W. Wayne Houck, Sheriff and Ex-Officio Tax Collector, Lincoln Parish, Louisiana, and successor to George B. Simonton, and a member of the Bar of the Supreme Court of the United States, do hereby certify to service of this Motion to Dismiss, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, by United States Mail, postage prepaid, on the following:

Counsel of Appellant

James H. Napper, II
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Ruston, Louisiana, this 29th day of May, 1984.

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